

Attorney list on signature page

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA – SAN JOSE DIVISION

RAMBUS, INC.,

Plaintiff.

V.

HYNIX SEMICONDUCTOR INC., HYNIX SEMICONDUCTOR AMERICA INC., HYNIX SEMICONDUCTOR MANUFACTURING AMERICA INC.,

SAMSUNG ELECTRONICS CO., LTD.,
SAMSUNG ELECTRONICS AMERICA, INC.,
SAMSUNG SEMICONDUCTOR, INC.,
SAMSUNG AUSTIN SEMICONDUCTOR,
L.P.,

NANYA TECHNOLOGY CORPORATION,
NANYA TECHNOLOGY CORPORATION
U.S.A.,

Defendants.

RAMBUS, INC.,

Plaintiff.

V.

SAMSUNG ELECTRONICS CO., LTD.,
SAMSUNG ELECTRONICS AMERICA, INC.,
SAMSUNG SEMICONDUCTOR, INC.,
SAMSUNG AUSTIN SEMICONDUCTOR,
L.P.,

Defendants.

Case No. C 05-00334 RMW

**SAMSUNG'S OPPOSITION TO
RAMBUS'S MOTION FOR SUMMARY
ADJUDICATION ON 17200 CLAIM IN
"COUNT VII" OF SAMSUNG'S
COUNTERCLAIMS**

[REDACTED VERSION]

Date: October 26, 2007
Time: 9:00 a.m.
Location: Courtroom 6
Judge: Hon. Ronald M. Whyte

Case No. C 05-02298 RMW

1 TABLE OF CONTENTS

	Page
3 Preliminary Statement.....	1
4 Background	2
5 I. The Rambus-Samsung License Agreement	2
6 II. The Rambus/Infineon Litigation	4
7 III. The Parties' Renegotiation of the License Agreement	5
8 IV. The 2005 Infineon Remand.....	5
9 V. Samsung's 17200 Counterclaim	6
10 Argument	7
11 I. In Failing to Address All the Possible Grounds for Samsung's 17200 Claim, Rambus Makes a Facially Insufficient Summary-Judgment Request.....	7
12 II. Samsung Did Not Release Its 17200 Claim in Section 2.12 of the 2000 License.....	8
13 A. The Release in Section 2.12 Is Limited by the Subject Matter of the Agreement, Which Involves Freedom from Infringement Claims and Particular Details of the Parties' Licensing Relationship	8
14 B. Contemporaneous Extrinsic Evidence Demonstrates That the Parties Did Not Believe the Release Covered JEDEC-Related Claims.....	11
15 C. Rambus's Subsequent Conduct Demonstrates That Rambus Did Not Believe the Release Covered JEDEC-Related Claims.....	13
16 D. The Release in Section 2.12 Does Not Contemplate Counterclaims	15
17 III. The Renegotiations in 2001 That Resulted in Amendment No. 1 Did Not Constitute an Implied Waiver of Samsung's 17200 Claim.....	15
18 A. Rambus's Implied-Waiver Argument Fails Because Samsung Did Not Sue Rambus for Damages for Fraudulent Inducement, But Rather Rambus Terminated the License and Sued Samsung for Infringement.	15
19 B. There Was No Implied Waiver Because Samsung Did Not Have Full Knowledge of the Material Facts When Amendment No. 1 Was Executed.....	18
20 C. Samsung and Rambus Made No Effort To Effect a Waiver and Never Communicated That the 2001 Renegotiation Effectuated a Waiver of Any and All Claims Connected with Rambus's JEDEC Conduct	20
21 1. The Contract Contains an Express Waiver of Rights in Section 2.12	20
22 2. Samsung Never Communicated to Rambus Any Intent To Waive JEDEC-Related Claims and Amendment No. 1 Does Not Contain Any Statement of Intent To Waive or Release Claims.	21
23 Conclusion	22
24	
25	
26	
27	
28	

1 TABLE OF AUTHORITIES
2
34 CASES
5
6

7	<i>Biggins v. Oltmer Iron Works</i> , 154 F.2d 214 (7th Cir. 1946).....	7
8	<i>Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.</i> , 2 Cal. App. 4th 342 (1992).....	20
9	<i>City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.</i> , 80 Cal. Rptr. 2d 329 (Ct. App. 1998).....	11, 13
10	<i>Coffman v. Fed. Labs.</i> , 171 F.2d 94 (3d Cir. 1948).....	7
11	<i>DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd.</i> , 30 Cal. App. 4th 54 (1994).....	19
12	<i>Dorr v. Janssen</i> , 378 P.2d 999 (Or. 1963).....	17
13	<i>Foad Consulting Group, Inc. v. Musil Govan Azzalino</i> , 270 F.3d 821 (9th Cir. 2001).....	11
14	<i>Harbold v. Stock</i> , 65 So. 2d 477 (Fla. 1953).....	17
15	<i>Jefferson v. California Dep't of Youth Authority</i> 28 Cal. 4th 299 (2002)	10
16	<i>Kendall McGaw Labs. Inc. v. Community Mem. Hosp.</i> , 125 F.R.D. 420 (D.N.J. 1989).....	7
17	<i>Leon v. Family Fitness Center (No. 107), Inc.</i> , 61 Cal. App. 4th 1227 (Ct. App. 1998).....	11
18	<i>Linda Coal & Supply Co. v. Tasa Coal Co.</i> , 204 A.2d 451 (Pa. 1964)	17
19	<i>Lopez v. Smith</i> , 203 F.3d 1122 (9th Cir.2000).....	8
20	<i>Marder v. Lopez</i> , 450 F.3d 445 (9th Cir. 2006).....	11
21	<i>Oakland Raiders v. Oakland-Alameda County Coliseum, Inc.</i> , 144 Cal. App. 4th 1175 (Ct. App. 2006).....	15, 16, 17, 19, 20
22	<i>Oleet v. Pa. Exchange Bank</i> , 285 A.D. 411 (N.Y. App. Div. 1955).....	17

1	<i>Rambus Inc. v. Infineon Techs, AG,</i> 164 F. Supp. 2d 743 (E.D. Va. 2001).....	14
2		
3	<i>Rambus, Inc. v. Infineon Techs. AG,</i> 330 F. Supp. 2d 679 (E.D. Va. 2004).....	5
4		
5	<i>Rambus, Inc. v. Infineon Techs. AG,</i> CA No. 3:00cv524 (E.D. Va.).....	4
6		
7	<i>Samsung Elecs. Co. v. Rambus Inc.,</i> 386 F. Supp. 2d 708 (E.D.Va. 2005).....	17
8		
9	<i>Samsung Elecs. Co. v. Rambus, Inc.,</i> 439 F. Supp. 2d 524 (E.D. Va. 2006).....	2, 3, 19, 20
10		
11	<i>Schmidt v. Mesmer,</i> 116 Cal. 267 (1897)	16
12		
13	<i>Sweat v. Big Time Auto Racing, Inc.,</i> 12 Cal. Rptr. 3d 678 (Ct. App. 2004).....	11
14		
15	<i>Trident Ctr. v. Conn. Gen. Life Ins. Co.,</i> 847 F.2d 564 (9th Cir. 1988).....	11
16		
17	<i>Victoria v. Superior Court,</i> 222 Cal. Rptr. 1 (1985)	8
18		
19	<i>Vikco Ins. Services, Inc. v. Ohio Indemnity Co.,</i> 70 Cal. App. 4th 55 (1999).....	20
20		
21	<i>Wal-Noon Corp. v. Hill,</i> 45 Cal. App. 3d 605 (1975).....	20
22		
23	<i>Welles v. Turner Entm't Co.,</i> 488 F.3d 1178 (9th Cir. 2007).....	8
24		
25	<i>Winet v. Price</i> 4 Cal. App. 4th 1159 (Cal. Ct. App. 1992)	10
26		
27	<i>Yount v. Acuff Rose-Opryland,</i> 103 F.3d 830 (9th Cir. 1996).....	21
28		

STATUTES

23	Cal. Bus. & Prof. Code § 17200	6
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25	Cal. Civ. Code § 1636 (2004)	11
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1 **PRELIMINARY STATEMENT**

2 Rambus's motion for summary adjudication, which impermissibly seeks judgment on a
 3 intermediate facts rather than on an entire claim, is premised on a release provision in a patent
 4 license agreement between Rambus and Samsung. Neither of the two arguments Rambus
 5 advances in its motion justifies summary judgment.

6 First, despite Rambus's attempt to evade liability through a sweeping and erroneous
 7 interpretation of the release provision, the JEDEC-related grounds for Samsung's 17200
 8 counterclaim are unrelated to that patent license agreement and in fact exist completely
 9 independent of the agreement.

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14 Moreover, the facts surrounding the negotiation of the license, as well as the conduct of
 15 the parties in implementing the license since its execution (which may be considered under
 16 controlling California law) demonstrate that the release is narrow and limited to patent claims,
 17 and does not reach the claims here. At a minimum, this evidence demonstrates that genuine
 18 issues of material fact on the scope of the release exist.

19 Rambus's second contention—that Samsung impliedly waived its right to raise the
 20 JEDEC-related grounds of its 17200 counterclaim when the parties negotiated an amendment to
 21 the license agreement in 2001—is likewise unsupportable. The authority upon which Rambus's
 22 implied-waiver argument rests is inapplicable to the circumstances of this case because it was
 23 Rambus who terminated the parties' agreement and initiated suit against Samsung, not vice versa.
 24 And the parties' intent that Samsung should have the right to challenge the enforceability of
 25 Rambus's patents via counterclaim if Rambus first asserted the licensed patents against Samsung
 26 is confirmed by the language of the parties' agreement and the contemporaneous statements of
 27 Rambus's negotiator.

28 Rambus's implied-waiver theory also fails because Samsung lacked full knowledge of all

1 material facts relating to Rambus's JEDEC misconduct at the time it negotiated the 2001
 2 amendment to the parties' license agreement—a prerequisite for any waiver under California law.
 3 Moreover, the language of the 2001 amendment to the parties' license agreement contains no
 4 statement of intended waiver and Rambus has failed to present any evidence that Samsung ever
 5 possessed that intent or, much less, communicated such an intent to Rambus. Rambus is left
 6 with the controlling language of the contract, which contains an express release that alone dictates
 7 the scope of released claims. Because the JEDEC portion of Samsung's 17200 counterclaim
 8 falls squarely outside the scope of that express release, Rambus' summary-judgment motion must
 9 be denied.

10 **BACKGROUND**

11 **I. THE RAMBUS-SAMSUNG LICENSE AGREEMENT**

12 Some background on the history of the Samsung/Rambus relationship, including patent
 13 licensing and litigation, will place Samsung's 17200 counterclaim into proper context and
 14 highlight the nature of the JEDEC-related grounds for that claim as distinct from the patent
 15 license agreement. As this Court has learned through its extensive experience with Rambus as a
 16 litigant, Rambus began licensing technology in the 1990s for a new proprietary memory called
 17 "RDRAM." Samsung took a license from Rambus for RDRAM and, ultimately, became
 18 Rambus's biggest ally and promoter in the memory market, investing huge sums in
 19 manufacturing and marketing RDRAM. Today, Samsung remains a licensee for RDRAM, and
 20 is the largest manufacturer of RDRAM products, including the Rambus memory that is used in
 21 Sony Playstation products (the "flagship" user of RDRAM).

22 Secretly, beginning in early 1998 and continuing through 1999 and 2000, Rambus
 23 developed, refined, and implemented a patent licensing and litigation strategy against mainstream
 24 memory technology that competed with its proprietary RDRAM memory products. *See*
 25 *Samsung Elecs. Co. v. Rambus, Inc.*, 439 F.Supp.2d 524, 527-28 (E.D. Va. 2006). This
 26 mainstream memory was developed out of open industry standard-setting activities taking place
 27 at JEDEC. In the mid-1990's, Rambus participated in the JEDEC standard-setting process
 28 without disclosing any intent to assert its patents against "non-Rambus" memory or any assertion

1 that it had rights to the open standards being developed by the industry. *Id.* at 544-45.
2 Rambus's secret strategy was aimed at Samsung as well as several other specifically identified
3 manufacturers of memory products. Among the other targeted manufacturers were Infineon,
4 Micron, and Hynix. *Id.* at 528.

5 This very misconduct was the subject of a lengthy investigation by the Federal Trade
6 Commission ("FTC"), which culminated in a liability opinion dated July 31, 2006. In its
7 opinion, the FTC found that Rambus's actions in infiltrating JEDEC, developing and
8 implementing its secret plan to reap royalties from non-Rambus memory products, and its later
9 litigation against the industry, violated United States antitrust laws. Ex. 1 at 118-19. The FTC
10 held a hearing to determine the remedies to be applied to correct the ill effects of Rambus's illegal
11 conduct, and ordered on February 2, 2007 that Rambus can no longer charge licensees more than
12 a maximum allowable royalty of 0.25% for SDRAMs and 0.5% for DDR DRAMs. Ex. 13 at 2-
13 3. Rambus has appealed the FTC's decision to the D.C. Circuit Court of Appeals.

14 In October 2000, after unleashing its strategy with a series of patent-infringement lawsuits
15 against mainstream SDRAM and DDR DRAM products, Rambus entered into a patent license
16 agreement with Samsung.

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13 **II. THE RAMBUS/INFINEON LITIGATION**

14 Rambus began litigating patent claims against SDRAM and DDR DRAM products made
15 by Infineon Technologies AG in August 2000. *Rambus, Inc. v. Infineon Techs. AG*, CA No.
16 3:00cv524 (E.D. Va.). Infineon counterclaimed in that action against Rambus for fraud based
17 on Rambus's claim that it obtained patents covering JEDEC standardized memory; Rambus,
18 however, never disclosed its patents or applications to JEDEC in the standard-setting process.
19 In connection with those fraud claims at trial, Infineon introduced evidence that Rambus attended
20 the JEDEC meetings first to try to get its own technology adopted as an industry standard; when
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1 that failed, Rambus continued to attend meetings to learn about the proposed standards being
2 developed so it could clandestinely use that information to attempt to obtain additional patents
3 covering those standards. *Rambus, Inc. v. Infineon Techs. AG*, 330 F.Supp.2d 679, 682-83 (E.D.
4 Va. 2004). Rambus then deliberately waited until after the industry had become “locked in” to
5 producing products that complied with the relevant standards to announce ownership of patents it
6 asserted covered the standards. *Id.* at 683. The *Infineon* litigation progressed to trial in April
7 2001, resulting shortly thereafter in a judgment of noninfringement against Rambus’s patent
8 claims and also a verdict of fraud against Rambus. *Id.*

9 **III. THE PARTIES’ RENEgotiation OF THE LICENSE AGREEMENT**

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IV. THE 2005 *INFINEON* REMAND

26 Subsequent to the parties’ negotiation of the 2001 Amendment, the Federal Circuit
27 remanded the *Infineon* litigation to the Eastern District of Virginia. During discovery on
28 remand, the district court pierced Rambus’s attorney-client privilege under the crime/fraud

1 exception, and Rambus produced an additional 4,673 documents that had previously been
 2 withheld under a claim of privilege. Ex. 7 at 33. These documents revealed for the first time
 3 details of Rambus's efforts to obtain patent coverage for the technology being standardized at
 4 JEDEC, specific details of Rambus's licensing and litigation strategy whereby Rambus secretly
 5 planned to assert its patents against JEDEC-compliant memory products only after the DRAM
 6 manufacturers became sufficiently locked-in to the standards, Rambus's secret dual employment
 7 of Samsung's in-house counsel, and details regarding Rambus's massive spoliation of evidence in
 8 an effort to conceal its misconduct relevant to each of these subjects.

9 **V. SAMSUNG'S 17200 COUNTERCLAIM**

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13 Rambus filed the present actions against Samsung on June 6, 2005. *See*
 14 Rambus's Am. Compl. in Case No. 05cv00334; Rambus's Orig. Compl. in Case No. 05cv02298.
 15 The lawsuits assert infringement of Rambus's patents by Samsung's JEDEC-compliant SDRAMs
 16 and DDR DRAMs. Rambus's Orig. Compl. at ¶ 10 and Counts I-X; Rambus's Am. Compl. at ¶
 17 13 and Counts I-IV, IX-XVIII. In its Second Amended Answer and Counterclaims, Samsung
 18 asserts a counterclaim for Rambus's violation of California's unfair competition statute, CAL.
 19 BUS. & PROF. CODE § 17200. *See* Samsung's 2d. Am. Answer & Countercls. at Count VII.
 20 Samsung's 17200 counterclaim arises out of Rambus's efforts to surreptitiously obtain patent
 21 coverage for open-standards memory technology standardized at JEDEC while failing to disclose
 22 its pending patent applications to JEDEC members, as well as Rambus's secret hiring of
 23 Samsung's in-house counsel, Neil Steinberg, at a time when Steinberg was employed by Samsung
 24 under a written employment contract that precluded any alternative employment, and Rambus's
 25 massive spoliation of evidence in an effort to conceal not only its JEDEC misconduct, but also its
 26 long-standing litigation plans against the DRAM industry. *Id.* at ¶¶ 285-291. Under the
 27 Court's Joint Case Management Order, only the JEDEC-related grounds for Samsung's 17200
 28 counterclaim will be tried at the upcoming consolidated conduct trial in January 2008. *See* Jt.

1 Case Mgmt. Conf. Stmt. (July 31, 2007) at Attachment 4. The remaining bases for Samsung's
 2 17200 claim will be tried in later phases of the case.

3 **ARGUMENT**

4 **I. IN FAILING TO ADDRESS ALL THE POSSIBLE GROUNDS FOR SAMSUNG'S 17200 CLAIM,
 5 RAMBUS MAKES A FACIALLY INSUFFICIENT SUMMARY-JUDGMENT REQUEST.**

6 Rambus seeks summary judgment on only the JEDEC-related grounds for Samsung's
 7 17200 counterclaim, Mot. at 2 n.2, and in doing so presents the Court with a facially invalid
 8 summary-judgment motion. The "JEDEC" facts are only some of the factual allegations upon
 9 which Samsung bases its 17200 counterclaim. Samsung pleaded other grounds in support of the
 10 claim as well, such as Rambus's dual employment of Neil Steinberg and its massive spoliation of
 11 evidence prior to unleashing its licensing and litigation policy on the DRAM industry starting in
 12 2000. *See* Samsung's 2d Am. Answer & Countercls. at ¶¶ 285-91. Even assuming that all of
 13 the arguments Rambus articulates in support of its motion are correct with respect to the
 14 "JEDEC" facts, which they are not, summary judgment on Samsung's 17200 counterclaim is
 15 available *only* if Rambus can demonstrate that there is no material fact issue as to the *entire*
 16 counterclaim. "Summary judgment may be had as to one claim among many, but it is well
 17 settled that neither subsection [of Rule 56] allows such a judgment as to one portion a claim."
 18 *Kendall McGaw Labs. Inc. v. Community Mem. Hosp.*, 125 F.R.D. 420, 421 (D.N.J. 1989); *see*
 19 *also Biggins v. Oltmer Iron Works*, 154 F.2d 214, 216 (7th Cir. 1946) (Rule 56 "does not
 20 contemplate a summary judgment for a portion of a single claim in suit. Neither does any other
 21 rule of the Rules of Civil Procedure so contemplate"); *Coffman v. Fed. Labs.*, 171 F.2d 94, 98 (3d
 22 Cir. 1948) (explaining that Rule 56 "does not contemplate a summary judgment for a portion of a
 23 single claim in suit"). Rambus cannot obtain summary judgment on intermediate facts in
 24 support of a claim; summary judgment is available only for entire claims or defenses.

25 Although Rambus acknowledges that Samsung's counterclaim is premised on more than
 26 just Rambus's JEDEC misconduct, *see* Mot. at 2 n.2 (noting Samsung's spoliation and Steinberg
 27 allegations), Rambus impermissibly seeks summary adjudication solely on the JEDEC bases of
 28 Samsung's 17200 counterclaim. Even if Rambus's request were granted, Samsung's

1 counterclaim could not be disposed of, and Rambus fails to demonstrate or even suggest that it
2 could be.

3 Moreover, summary judgment on a claim is, of course, precluded if a material fact issue
4 exists, *see, e.g., Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir.2000) (en banc), and there are most
5 definitely, at a minimum, material fact issues regarding whether Rambus's spoliation of evidence
6 and secret retention of Samsung's in-house counsel, Neil Steinberg, constitute unfair competition
7 under Section 17200—particularly since the Court must, in deciding Rambus's motion, view the
8 evidence in the light most favorable to Samsung and draw all reasonable inferences in Samsung's
9 favor. *Welles v. Turner Entm't Co.*, 488 F.3d 1178, 1183 (9th Cir. 2007). Rambus's summary-
10 judgment motion is, quite simply, improper and should be denied.

11 **II. SAMSUNG DID NOT RELEASE ITS 17200 CLAIM IN SECTION 2.12 OF THE 2000 LICENSE.**

12 **A. The Release in Section 2.12 Is Limited by the Subject Matter of the
13 Agreement, Which Involves Freedom from Infringement Claims and
Particular Details of the Parties' Licensing Relationship.**

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The authority Rambus cites does not support its overbroad construction of the release's

1 scope. In *Jefferson v. California Dep't of Youth Authority*, for instance, the California Supreme
 2 Court held that the plaintiff had released her sex-discrimination claim against her former
 3 supervisor in a workers' compensation settlement for stress-related injuries. 28 Cal. 4th 299,
 4 302 (2002). Rambus focuses on the court's uncontroversial holding that "all claims" covers
 5 claims that are not expressly enumerated in the release, but fails to recognize the significance of
 6 the express language of the release, which limits the scope of the release to claims "which may
 7 hereafter arise or develop *as a result of [the claimed stress-related] injury.*" *Id.* (emphasis
 8 added). Because the plaintiff's claim was based on conduct of her supervisor that had *caused*
 9 her stress-related injury, the court merely honored the explicit language of the release to preclude
 10 a claim that plainly developed as a result of the plaintiff's stress-related injury. The holding in
 11 *Jefferson* does not justify Rambus's expansion of the scope of Samsung's release beyond claims
 12 related to or arising out of Samsung's licensing relationship with Rambus.

13 Rambus's reliance on *Winet v. Price* similarly fails to support its overbroad reading of
 14 Samsung's release, and in fact illustrates that the JEDEC-related grounds for Samsung's 17200
 15 claim are not covered by the release. The release in *Winet*, in which the plaintiff was barred
 16 from asserting a malpractice claim against his former attorney as a result of a release given in
 17 settlement of an earlier fee dispute, specifically included within its scope claims "arising out of or
 18 in any manner connected with the performance of legal services" by the attorney for the plaintiff.
 19 4 Cal. App. 4th 1159, 1163 (Cal. Ct. App. 1992) (internal quotation marks omitted). Given the
 20 explicit language extending the *Winet* release to preclude any claims connected with the
 21 attorney's provision of legal services to the plaintiff, and not limiting it to just the fees-related
 22 subject matter of the agreement, the court not surprisingly decided that the plaintiff's malpractice
 23 claims were released in the fees settlement. The breadth of the expansive *Winet* release, which
 24 explicitly and unambiguously included all facets of the attorney's representation of the plaintiff
 25 within its scope, stands in stark contrast to the more limited release granted by Samsung to
 26 Rambus. In fact, the *Winet* decision illustrates that for Samsung to have released any and all
 27 claims related to Rambus's patents—as Rambus would have it—rather than just those claims
 28 relating to or arising out of the parties' licensing relationship, an explicit statement expanding the

1 release to any claims “arising out of or in any manner connected with Rambus’s patents” would
 2 have been required.³

3 **B. Contemporaneous Extrinsic Evidence Demonstrates That the Parties Did Not
 4 Believe the Release Covered JEDEC-Related Claims**

5 Under California law, the fundamental goal of contract interpretation is to give effect to
 6 the mutual intent of the parties as it existed at the time of contracting. CAL. CIV. CODE § 1636
 7 (2004). The “mutual intention” to which the courts give effect is determined by “objective
 8 manifestations of the parties’ intent, including the words used in the agreement, as well as
 9 extrinsic evidence of such objective matters as [1] the surrounding circumstances under which the
 10 parties negotiated or entered into the contract; [2] the object, nature and subject matter of the
 11 contact; and [3] the subsequent acts and conduct of the parties.” *City of Atascadero v. Merrill*
 12 *Lynch, Pierce, Fenner & Smith, Inc.*, 80 Cal. Rptr. 2d 329, 474 (Ct. App. 1998) (as modified on
 13 denial of reh’g Jan. 6, 1999). Accordingly, under California law, even if the written agreement
 14 of the parties is clear and unambiguous on its face, the Court must consider relevant extrinsic
 15 evidence that can demonstrate a meaning to which the language of the contract is reasonably
 16 susceptible. *Trident Ctr. v. Conn. Gen. Life Ins. Co.*, 847 F.2d 564, 570 n.6 (9th Cir. 1988)
 17 (reversing grant of summary judgment to allow plaintiff to present extrinsic evidence); *Foad*
 18 *Consulting Group, Inc. v. Musil Govan Azzalino*, 270 F.3d 821, 828 (9th Cir. 2001) (explaining
 19 that California parol evidence rule “requires courts to consider extrinsic evidence of possible
 20 ambiguity even where the terms of the contract appear unequivocal. And if a party’s extrinsic

21 ³ See also, e.g., *Sweat v. Big Time Auto Racing, Inc.*, 12 Cal. Rptr. 3d 678, 1307-08 (Ct. App.
 22 2004) (release of race-related injury might include collapse of bleachers due to race-related event,
 23 but did not include claim for same injury when events leading to collapse of bleachers were not
 24 race-related); *Leon v. Family Fitness Center (No. 107), Inc.*, 61 Cal. App. 4th 1227, 1231, 1235
 25 (Ct. App. 1998) (where general release to gain access to fitness club released claims “resulting
 26 from or related to Member’s use of the facilities or participation in any sport, exercise or activity
 27 within or without the club premises,” claim for injury sustained when sauna bench collapsed was
 28 not released because “Family Fitness’s negligence was not reasonably related to the object or
 purpose for which the release was given, that is, *as stated*, injuries resulting from participating in
 sports or exercise rather than from merely reclining on the facility’s furniture”) (emphasis added);
Marder v. Lopez, 450 F.3d 445, 449 (9th Cir. 2006) (where plaintiff, who inspired movie
Flashdance, signed release of claims “arising out of or in any way connected with, either directly
 or indirectly, any and all arrangements . . . in connection with the preparation of screenplay
 materials and the production, filming and exploitation of . . . *Flashdance*,” release did not cover
 claim against Paramount for defaming her dance routine because insufficient nexus to subject
 matter of release) (internal quotation marks omitted).

1 evidence creates the possibility of ambiguity, a court may not rely on the text of the contract
2 alone to determine the intent of the parties").

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21 **C. Rambus's Subsequent Conduct Demonstrates That Rambus Did Not Believe**
22 **the Release Covered JEDEC-Related Claims.**

23 Under California law, the Court may also consider facts concerning post-contract
24 performance to determine the meaning of a contract's terms. *See, e.g., City of Atascadero*, 80 Cal.
25 Rptr. 2d at 474. Samsung and Rambus's course of conduct after the execution of the agreement
26 demonstrates that they understood the release to be narrow in scope and limited to patent issues.

27 ⁴ The deleted language from former Section 2.11 was included in revised form in Section 8.4 of
28 the final agreement, but was recrafted, per Steinberg's email, to permit Rambus to terminate the
agreement if Samsung voluntarily participated in any effort to challenge the validity and/or
enforceability of any of the Rambus Patents. Ex. 2 at R1119729-30. Again, Rambus need not
have included this language if Samsung had already released Rambus from any and all liability
that might affect the validity or enforceability of its patents.

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2 **D. The Release in Section 2.12 Does Not Contemplate Counterclaims.**

3 Rambus's erroneous reading of the release must be rejected for another reason as well.

4 The express language of Section 2.12's general release does not include or contemplate

5 counterclaims, which is what is at issue in Rambus's motion. The purpose of the release, as

6 demonstrated by the plain language of the license and parol evidence indicating the parties'

7 understanding, *see supra* Sections II.A, II.B, was to preclude Samsung from suing Rambus on

8 grounds relating to Rambus's licensing of its patents to Samsung. The release does not

9 contemplate the circumstance presented here—where it was Rambus who unilaterally terminated

10 the license and asserted its patents against Samsung. Because Rambus offensively asserted its

11 patents against Samsung, Samsung's 17200 counterclaim challenging the enforceability of

12 Rambus's patents is much more akin to a defense than an affirmative claim in the context of this

13 license.

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20 **III. THE RENEGOTIATIONS IN 2001 THAT RESULTED IN AMENDMENT NO. 1 DID NOT**

21 **CONSTITUTE AN IMPLIED WAIVER OF SAMSUNG'S 17200 CLAIM.**

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23 **A. Rambus's Implied-Waiver Argument Fails Because Samsung Did Not Sue**

24 **Rambus for Damages for Fraudulent Inducement, But Rather Rambus**

25 **Terminated the License and Sued Samsung for Infringement.**

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29 Rambus wrongly contends that by negotiating an amendment to the license after Samsung

30 learned certain information about Rambus's JEDEC conduct, Samsung somehow implicitly

31 waived any future claims involving Rambus's JEDEC conduct. Rambus's implied-waiver

32 argument relies entirely on a line of California authority, articulated most recently by the

33 California Court of Appeals in *Oakland Raiders v. Oakland-Alameda County Coliseum, Inc.*, 144

34 Cal. App. 4th 1175 (Ct. App. 2006), that holds that when a contracting party contends that it was

1 induced into signing a contract by fraud or deceit, the party is deemed to have waived a damages
 2 claim arising from the fraud if, after discovery of the fraud, he enters into a new contract with the
 3 defendant regarding the same subject matter that confers upon him significant benefits. *Id.* at
 4 1186. But a review of *Oakland Raiders* and the authority upon which it rests reveals that its
 5 holding does not extend to the situation here, in which Rambus sued Samsung for patent
 6 infringement.

7 The *Oakland Raiders* court made much of the fact that, upon learning of a
 8 misrepresentation regarding ticket sales, the Oakland Raiders entered into a new contract with the
 9 Oakland-Alameda County Coliseum (OACC) *without ever mentioning any knowledge of the*
 10 *misrepresentation*, and then later rescinded the contract and sued the OACC for damages arising
 11 from its misrepresentation. *Id.* at 1190-91. The Oakland Raiders' failure to notify the OACC
 12 of its knowledge of the misrepresentation rendered inequitable its later rescission of the contract
 13 and suit for damages arising from the misrepresentation:

14 [I]t is evident that the party who keeps his intended charge of fraud secret for
 15 years has a great advantage *in preparing for a future intended action, which he*
 16 *alone anticipates*, over his adversary, who has had no intimation of such action or
 17 such charge of fraud, and has had no reason to preserve or discover evidence
 18 concerning it. Noting the injustice of permitting a party to gain new benefits
 19 'without giving any warning to the other party that he intends at some future time
 to charge him with fraud,' the [California Supreme Court in *Schmidt*] fashioned
 the rule that a party aware of the alleged fraud must stand at arm's length from his
 adversary and not enter into a new agreement extracting concessions, lest he be
 deemed to have waived his claim of fraud.

20 *Id.* at 1189 (internal citation omitted) (emphasis added). The *Oakland Raiders* court, as well as
 21 the California Supreme Court in *Schmidt v. Mesmer*, 116 Cal. 267 (1897), hinged their decisions
 22 on the inequity inherent in concealing an intent to bring a future fraud claim while extracting
 23 benefits through a new contractual deal, resorting to estoppel, rather than pure waiver principles,
 24 to prevent the party against whom waiver is asserted from inducing reliance by the other party.
 25 *Id.* at 1190.

26 This reasoning demonstrates that the *Oakland Raiders/Schmidt* analysis, upon which
 27 Rambus's implied waiver argument exclusively rests, is wholly inapplicable to the case at bar.

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14 Because Rambus was in no way induced to rely on any conduct
15 of or silence by Samsung in connection with the 2001 negotiations, *Oakland Raiders* and *Schmidt*
16 do not dictate the result in this case.

17 Moreover, the significance of the sequence of events in this case—that Rambus initiated
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19 ⁶ The facts of *Oakland Raiders* and every case cited therein in support of its implied-waiver
20 holding involve a suit for fraud damages initiated by the party against whom waiver is asserted.
21 See *Oakland Raiders*, 144 Cal. App. 4th at 1187 (citing *Dorr v. Janssen*, 378 P.2d 999, 1001 (Or.
22 1963) (request and agreement to extend time for payment **waived fraud claim** as a matter of law);
23 *Harbold v. Stock*, 65 So.2d 477, 478 (Fla. 1953) (purchaser of stock who negotiated a new
24 contract with seller and received additional concessions **waived claim of fraudulent inducement**);
Oleet v. Pa. Exchange Bank, 285 A.D. 411, 413-15 (N.Y. App. Div. 1955) (borrowers who
25 **claimed bank fraudulently induced** them to sign promissory notes negotiated subsequent
agreement changing the timing and terms of payment; complaint dismissed at the pleading stage);
Linda Coal & Supply Co. v. Tasa Coal Co., 204 A.2d 451, 453-54 (Pa. 1964) (tenant who, **after**
discovery of alleged fraud, reaches a new agreement with landlord granting him more favorable
terms **waives claim for damages**)).

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1 suit against Samsung for infringement in response to which Samsung asserted a counterclaim
2 based in part on Rambus's JEDEC conduct—is underscored by a provision in the SDR/DDR
3 License and carried over to the 2001 Amendment.

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**B. There Was No Implied Waiver Because Samsung Did Not Have Full
Knowledge of the Material Facts When Amendment No. 1 Was Executed.**

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Rambus's reliance on *Oakland Raiders* as the basis for its implied-waiver theory fails for an additional reason. The *Oakland Raiders* court acknowledged the California Supreme Court's holding in *Schmidt* that, for a party to be deemed to have waived a cause of action for fraud based on entering into a second contract covering the same subject matter with the party who committed

1 the fraud, the party against whom waiver is asserted must have done so “with full knowledge of
 2 all the material facts.” *Oakland Raiders*, 144 Cal. App. 4th at 1192, *see also DRG/Beverly Hills,*
 3 *Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd.* 30 Cal. App. 4th 54, 59 (1994) (reiterating
 4 general principle that waiver involves the intentional relinquishment of a known right after full
 5 knowledge of the facts). But Samsung did not have full knowledge of all the material facts
 6 relating to Rambus’s JEDEC misconduct when it negotiated the 2001 Amendment with Rambus.
 7 Although Samsung knew at the time of the fraud verdict reached by the *Infineon* jury, many more
 8 damaging details regarding Rambus’s efforts to surreptitiously obtain patent coverage over the
 9 technology being standardized at JEDEC were revealed when the *Infineon* district court pierced
 10 Rambus’s attorney-client privilege under the crime-fraud exception upon remand of the *Infineon*
 11 case in 2004.

12 Documents produced as a result of the *Infineon* court’s privilege-piercing order revealed,
 13 for instance, that Rambus’s JEDEC representative, Richard Crisp, was meeting regularly with
 14 Rambus’s in-house and outside patent counsel to discuss ways to amend Rambus’s pending
 15 patent claims to cover JEDEC standards being discussed at the JEDEC meetings he attended so
 16 that Rambus could assert its patents against those who manufactured compliant products,
 17 including Samsung. *See Samsung Elecs. Co. v. Rambus Inc.*, 439 F.Supp.2d 524, 544 (E.D.Va.
 18 2006). Likewise, Samsung first learned from documents produced after the 2001 negotiations
 19 that Rambus had not only ranked Samsung among its most desirable litigation targets based on an
 20 analysis of various business and litigation-related factors, but had also reverse-engineered one of
 21 Samsung’s JEDEC-compliant SDRAMs. *Id.* at 553. Nor did Samsung know until the *Infineon*
 22 remand in 2005 that Rambus had secretly retained Samsung’s in-house counsel, Neil Steinberg, at
 23 a time when Steinberg was still employed by Samsung under an employment contract that
 24 prohibited such alternative employment, to help Rambus create a licensing and litigation strategy
 25 that involved asserting Rambus’s patents against JEDEC-compliant DRAMs manufactured by
 26 Samsung and others. *Id.* at 549, 557-58. Finally, Samsung was without the requisite
 27 knowledge until at least 2005 of Rambus’s efforts to destroy massive amounts of damaging
 28 evidence that would reveal its conduct at JEDEC and its long-standing litigation plans against the

1 DRAM industry. *Id.* at 549-54, 559.

2 In light of the vast amount of information that Samsung did not have about Rambus's
 3 conduct at the time the parties renegotiated their SDR/DDR License in 2001, it certainly cannot
 4 be said that Samsung had "full knowledge of all material facts" such that Samsung could now be
 5 deemed to have waived its JEDEC-related counterclaim. *Oakland Raiders*, 144 Cal. App. 4th at
 6 1192. At a minimum, construing the evidence in the light most favorable to Samsung and
 7 drawing all inferences in Samsung's favor, a fact issue is presented for trial, and Rambus's
 8 motion must be denied.

9 **C. Samsung and Rambus Made No Effort To Effect a Waiver and Never
 10 Communicated That the 2001 Renegotiation Effectuated a Waiver of Any and
 All Claims Connected with Rambus's JEDEC Conduct.**

11 1. The Contract Contains an Express Waiver of Rights in Section 2.12.

12 Upon the failure of its implied-waiver argument, Rambus is left with the express language
 13 of the parties' agreement, which already contains an explicit waiver of rights in Section 2.12's
 14 release provision. Because the parties reduced their intended release to writing, it would be
 15 illogical and against accepted rules of contract interpretation to read an additional, unstated
 16 waiver into the contract as a backstop in the event that a claim is not covered by the express
 17 release. *See Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.*, 2 Cal.
 18 App. 4th 342, 374 (1992) ("[A]s a general matter, implied terms should never be read to vary
 19 express terms"); *Wal-Noon Corp. v. Hill*, 45 Cal. App. 3d 605, 613 (1975) ("This is in accord
 20 with the general principle that, in interpreting a contract 'an implication ... should not be made
 21 when the contrary is indicated in clear and express words.'") (quoting 3 A. CORBIN, CONTRACTS
 22 § 564 (2d ed. 1960)); *Vikco Ins. Services, Inc. v. Ohio Indemnity Co.*, 70 Cal. App. 4th 55, 70
 23 (1999) ("Implied covenants are disfavored at law. The courts will not imply a better agreement
 24 for parties than they themselves have been satisfied to enter into, or rewrite contracts whenever
 25 the operate harshly. There can be no implied covenant where the subject matter is completely
 26 covered by the existing contract.").

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1 2. Samsung Never Communicated to Rambus Any Intent To Waive JEDEC-
 2 Related Claims and Amendment No. 1 Does Not Contain Any Statement of
 Intent To Waive or Release Claims.

3 Significantly, Rambus presents no evidence that Samsung communicated any intent to
 4 waive JEDEC-related claims during the course of the parties' negotiations in 2001.

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 14 Certainly nothing in Samsung's letter can be construed as a communication to Rambus of
 15 Samsung's intent that any amendment negotiated as a result of the *Infineon* verdict should act as a
 16 waiver of Samsung's right to pursue JEDEC-related claims against Rambus in the future,
 17 particularly if such claims are asserted as counterclaims to an infringement suit initiated by
 18 Rambus upon Rambus's termination of the parties' agreement. Moreover, Rambus's reliance on
 19 Samsung's statement in Delaware briefing is nothing more than a "gotcha" that has no relevance
 20 to the issue of waiver, as it fails to demonstrate that any contemporaneous understanding that
 21 Samsung intended to effect a waiver was ever communicated to Rambus during negotiations in
 22 2001. *See, e.g., Yount v. Acuff Rose-Opryland*, 103 F.3d 830, 836 (9th Cir. 1996) (under
 23 California law, subjective, uncommunicated intent is irrelevant to contract interpretation).

24 The fact remains that, despite Rambus's attempt to portray a statement from Samsung's
 25 Delaware briefing as an admission of some relevance, Amendment No. 1 lacks any language
 26 reflecting an intent to waive or release JEDEC-related claims. Rambus's effort to read such a

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⁸ And of course, as a sophisticated party who has given waivers, Samsung knows how to
 communicate a waiver when it intends one.

1 waiver into the contract is contrary to California law, and Rambus's failure to produce any
2 contemporaneous evidence to controvert the lack of any express waiver language in the contract
3 precludes summary judgment.

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5 **CONCLUSION**

6 For the foregoing reasons, Samsung respectfully requests that this Court deny Rambus'
7 motion for summary adjudication.
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1 Dated: October 5, 2007
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